FOONG YEEN KENG A

v.

ASSUNTA HOSPITAL (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
RAUS SHARIF J
[CIVIL APPEAL NO: R1-12-195-1997]
1 DECEMBER 2005

TORT: *Negligence - Professional negligence - Medical negligence - Whether clinical judgment exercised during treatment of patient may render doctor liable for negligence merely because his opinion differs from that of other doctors - Whether doctor acted with ordinary care and skill of a doctor with his qualifications - Whether hospital can be faulted where doctor exercises clinical judgement* C D

TORT: *Negligence - Res ipsa loquitor - Application of this principle in relation to medical negligence - Whether occurrence of injury during medical treatment is evidence of lack of reasonable care*

CIVIL PROCEDURE: *Appeal - Retrial - Findings of trial judge not substantiated with reasons - Whether retrial should be ordered - Whether in best interest of all parties and justice to order retrial* E

On 20 December 1985, the appellant was suffering a severe pain in the lower abdominal area. She was referred to Assunta F Hospital, the first respondent ("hospital") where she was given a medical check-up and thereafter admitted. A short while later she was operated for appendicitis by the second respondent ("Dr. Sabapathy"). During the operation, Dr. Sabapathy found that the right ovarian cyst had ruptured. The appellant's ovarian cyst, as G well as the appendicitis was then removed. After the operation, the appellant was admitted to the ward. While at the hospital, she was managed by Dr. Sabapathy until he went on leave on 28 December 1985. During the period Dr. Sabapathy was away, the appellant was managed by a consultant surgeon, Dr. K.T. Lim. H After the operation the appellant was experiencing tremendous pain. When Dr. Sabapathy returned from his leave on 6 January 1986, he suggested a second operation (laparatomy). The appellant underwent a second operation on 7 January 1986 and pus was found in the right paracolic gutter and was cleared. The I appellant was discharged from the hospital on 18 January 1986 and went for follow-up check-ups.

The appellant then commenced this suit claiming against the hospital and Dr. Sabapathy for breach of contractual duty and/or professional negligence and/or breach of duty of care of the both of them. The appellant's claim was dismissed by the trial judge. The appellant appealed on the grounds that the trial judge had failed to consider that negligence was proven against the hospital and Dr. Sabapathy with respect to the two operations and the management of the appellant during the operation and post-operation. With respect to the Dr. Sabapathy, the appellant contended that he had failed to insert a corrugated drain to drain the wound in the first operation which by itself had brought about those infections and that he failed to indicate that a drain if ever was really inserted. It was also alleged that he had altered the medical records and tampered with evidence and that he failed to ensure immediate administration of antibiotic after the operation. With respect to the hospital, the appellant contended that the hospital had through its servants and/or agents negligently managed the two operations of the appellant and negligently managed the appellant in post-operation treatment and care.

Counsel for the appellant also complained that there was a three and a half year delay on the part of the trial judge in making the decision and judgement and that there were no grounds found in the judgement. He thus submitted that the principle that the appellate court should be slow in interfering the findings of facts of the court of first instant should not be applicable in this appeal. Counsel urged the court to consider the issues afresh based on the evidence available in the record of appeal. It was also the appellant's contention that the maxim of *res ipsa loquitor* applied in this case.

Held (dismissing the appeal with costs):

(1) The trial judge did not substantiate her findings with reasons. An easy way out in this kind of situation is for the court to order a retrial. But in view that the cause of this action arose in 1985 and the fact that the case had been delayed for a considerable time, where nine witnesses had testified and voluminous documents being tendered as exhibits, it was not in the best interest of all parties concerned, and above all justice, that the case be sent back to the Sessions Court to be heard again by another judge. Therefore, the court decided to approach this appeal by examining the record to see whether there were enough materials to support the conclusion of the trial judge. (paras 19 & 20)

(2) The court agreed with the decision of the trial judge who had found that Dr. Sabapathy had inserted a corrugated drain and removed it 24 hours later. Further, based on the evidence and facts presented at the trial, the court was unable to conclude that Dr. Sabapathy had altered the medical records and tempered with the evidence. The court also was unable to accept the appellant's contention that Dr. Sabapathy had failed to ensure immediate administration of antibiotic after the operation. The trial judge had also correctly and adequately taken into account all relevant evidence and exhibits in arriving at her finding of facts in favour of the hospital. The hospital could not be said to be negligent for failure to properly administer adequate and correct antibiotics to prevent post-operative infections. (paras 29, 30, 36 & 42)

(3) Whether an early laparatomy must be carried out instead of adopting conservative treatment is a clinical decision. Different opinions always exist. If one treatment overtakes the other and goes wrong, it cannot be a basis for a conclusion of negligence. Thus, if there was a delay, the delay was due to the conservative treatment undertaken by Dr. K.T. Lim. The decision whether to operate or not was a matter of clinical judgment of the attending doctor. It is for the attending doctor to decide based on the circumstances of the case at that time. The conservative treatment undertaken by Dr. K.T. Lim was an acceptable and reasonable practice in such circumstances. (paras 52, 53 & 54)

(4) The difference of opinion as to the treatment of a patient does not make a doctor negligent merely because his opinion leading to his diagnosis differs from that of other doctors. What is important is he acts with the ordinary care and skill of a doctor with his qualifications. What Dr. K.T. Lim had decided then was his clinical judgment. It would have been wrong on his part to proceed with a laparatomy operation without attempting conservative treatment. Therefore, the allegation made by the appellant in respect of the conservative treatment, timing of the second operation and the early laparatomy all involved clinical judgement. The hospital could not be faulted where such judgments were exercised. (paras 55, 56 & 57)

(5) The maxim of *res ipsa loquitor* or 'the thing speaks for itself' was not applicable in this case. The fact that the patient came out of a hospital in a worse condition before admittance does not constitute proof of negligence by the hospital staff. Medical treatment carries the risk and the occurrence of injury is not necessarily evidence of lack of reasonable care. (para 58)

Case(s) referred to:
Ballard v. North British Railway Co [1923] SC (HL) 53 ***(refd)***
Cassidy v. Ministry of Health [1951] 1 All ER 577 ***(refd)***
Hucks v. Cole and Author [1968] 112 SJ 483 ***(refd)***
Mahon v. Osborne [1939] 2 KB 14 ***(refd)***
Schanczl v. Singh [1988] 2 WWR 465 ***(refd)***

Other source(s) referred to:
British Medical Journal Vol. 280 January-March 1980, p. 29

For the appellant - Mohd Shafee Abdullah; (Frida Krishnan & Azlena Maria with him); M/s Shafee & Co
For the 1st respondent - Edmund Bon (LY Choi with him); M/s Chooi & Co
For the 2nd respondent - PS Ranjan (MS Dhillon with him); M/s PS Ranjan & Co

Reported by Amutha Suppayah

JUDGMENT

Raus Sharif J:

[1] This is an appeal against the decision of the learned Session Court Judge ("trial judge") made on 2 August 1997, who have dismissed the appellant's claim against both respondents.

[2] On 30 October 2004, after hearing the parties, the appellant's appeal was dismissed. I now give my reasons.

[3] The background facts of this case are these. On 20 December 1985, the appellant was suffering a severe pain in the lower abdominal area. She sought advice and treatment in a private clinic at Jalan Klang Lama. At the private clinic, she was examined by Dr. Leong Kok Weng, who later referred her to Assunta Hospital, the first respondent ("hospital").

[4] At the hospital, the appellant was given a medical check-up and thereafter admitted. A short while later she was operated for appendicitis by Dr. A. K. Sabapathy, the second respondent ("Dr. Sabapathy"). During the operation, Dr. Sabapathy found that the right ovarian cyst had ruptured. The appellant's ovarian cyst, as well as the appendicitis was then removed.

[5] After the operation, the appellant was admitted to the ward. While at the hospital, she was managed by Dr. Sabapathy until he went on leave on 28 December 1985. During the period Dr. Sabapathy was away, the appellant was managed by a consultant surgeon Dr. K.T. Lim.

[6] After the operation the appellant was experiencing tremendous pain. When Dr. Sabapathy returned from his leave on 6 January 1986 he suggested a second operation (laparatomy). The appellant underwent a second operation on 7 January 1986 and pus was found in the right paracolic gutter and was cleared.

[7] The appellant was discharged from the hospital on 18 January 1986 and went for follow-up check-ups on 21 January 1986, 28 January 1986 and 25 February 1986.

[8] According to the appellant, that on the third visit, Dr. Sabapathy told her that it was not necessary for her to come back and she could see other clinic for dressing. The appellant then sought and underwent further treatment and medical attention at Tung Shin Hospital, Klinik Ng Lee, Klinik Sri Gombak and Dr. Leela Ratos at Kuala Lumpur to reduce her abdominal pain.

[9] In this suit the appellant is claiming against the hospital and Dr. Sabapathy for breach of contractual duty and/or professional negligence and/or breach of duty of care of the both of them resulting the appellant suffering internal injuries, endured pain and suffering and mental anguish and has been put to loss and expenses. Both the hospital and Dr. Sabapathy denied the allegations.

[10] At the trial the following witnesses were called:

For the appellant

(i) Foong Yee Keng (PW1) – appellant;

(ii) Dr. Muthukumaran (PW2) – Consultant Surgeon at Tung Shin Hospital; and

(iii) Foong Chong Keng (PW3) – appellant's father.

For the respondents

(i) Dr. A. K. Sabapathy (DW1) – Second respondent;

(ii) Dr. Leong Kok Weng (DW2) – Doctor who referred the appellant to the hospital;

(iii) Dr. Kylasa Somasundram (DW3) – Consultant Surgeon at Tawakal Hospital;

(iv) Theresa Pangajshi (DW4) – Night Supervisor at the hospital;

(v) Kamalasani a/p Nadarajah (DW5) – Head of Pharmacy at the hospital; and

(vi) Lee Chong Hing (DW6) – Medical Superintendent at the hospital.

[11] On 2 August 1997, the appellant's claims was dismissed by the trial judge.

[12] Before me the main complaint of the appellant was a failure on the part of the trial judge to consider that negligence was proven against the hospital and Dr. Sabapathy with respect to:

(a) the two operations; and

(b) the management of the appellant during operation and post operation.

[13] With respect to the Dr. Sabapathy it is the appellant's contention that Dr. Sabapathy:

(i) Failed to insert a corrugated drain to drain the wound in the first operation which by itself had brought about those infections and that he failed to indicate that a drain if ever was really inserted;

(ii) altered the medical records and tampered with evidence; and

(iii) failed to ensure immediate administration of antibiotic after the operation.

[14] With respect to the hospital it was the appellant's contention that the hospital had through its servants and/or agents by:

(i) negligently managed the two operations of the appellant; and

(ii) negligently managed the appellant in post operation treatment and care.

[15] At the outset, Dato' Shafee leading counsel for the appellant complained that there was 3 1/2 years delay on the part of the trial judge in making the decision and judgement. He further complained that there are no grounds found in the judgment. In other words, he is contending that the judgment is non speaking judgement. Thus, he submitted that the principle that the appellate court should be slow in interfering the findings of facts of the court of first instant, should not be applicable in this appeal. Hence, he is urging this court to consider the issues afresh based on the evidence available in the record of appeal. According to him, there are sufficient evidence to support the appellant claims against the hospital as well as Dr. Sabapathy, thus he urged this court to find in favor of the appellant.

[16] Leading counsel for Dr. Sabapathy, Mr. P.S. Ranjan contended that even if the judgement is a non-speaking judgment, there are enough materials for this court to support the findings of the trial judge. Accordingly, he urged this court to dismiss the appellant's appeal with costs.

[17] Leading counsel for the hospital, Mr. Edmund Bon was of the same mind with Mr. P.S. Ranjan. According to Mr. Edmund Bon there are materials before this court to justify the decision of the trial judge that on the balance of probabilities, the appellant had failed to prove her case.

[18] To appreciate the arguments of counsels it is necessary to look at what the trial judge said in her grounds of judgement. The trial judge after setting out the facts, said the followings:

> Daripada keterangan saksi dan dokumen yang dikemukakan khususnya kad-kad seperti "cardex card" bagi ubatan yang diberi (Exhibit D31); dan suntikan ("injection") yang diberi (Exhibit D35), dan "observation chart" (Exhibit P9Ac) jelas bahawa rawatan telah diberi oleh pihak DF1. Dari rekod yang diperolehi daripada kad-kad ini jelas jagaan yang dijangka telah pun diberi oleh DF1. Exhibit P14 ("Doctor's Order Sheet") dan Exhibit P8 ("Medicine Sheet") menunjukkan ubatan telah diberi oleh DF1 seperti diarah oleh DF2, doktor yang bertanggungjawab menjaga plaintif. Seterusnya semasa DF1 bercuti seorang doktor lain telah menjaga plaintif.
>
> Bagi pihak DF2 pula semasa ia bercuti seperti dikatakan, seorang doktor lain telah menjaga plaintif. DF2 telah melakukan kedua-dua pembedahan yang difikir perlu bagi plaintif. Dari keterangan DF2

sendiri dan saksi pakarnya, DW3, tidak dapati yang DF2 telah cuai atau mengabaikan tugas/tanggungjawabnya terhadap plaintif. Saya setuju dengan hujah pihak defendan bahawa:

(i) But in case of surgeon, he does not guarantee a cure. His undertaking is to exercise reasonable care and skill and diligence in attempting to achieve the desired result. Surgeon attempts but cannot be taken too far eg, if he were to operate on the right leg he could not get away by operating on the left leg. ... DF2 had done his part – operate etc. and have a case managed by one other surgeon but complication could still occur;

(ii) ... the standard of care which the law requires is not an insurance against accidental slips. It is such a degree of care as a normally skilful member of the profession may reasonably be expected to exercise in that actual circumstances of the case in question. It is not every slip or mistake which imports negligence and, in applying the duty of care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention. – Scott LJ in *Mahon Osborne* [1939] KB 14, 31.

Seterusnya "a high standard of proof is required in a professional negligence action." Dalam kes *Hucks v. Cole,* Lord Denning MR di ms 6 menyatakan:

> A charge of negligence against a medical man, a solicitor or any other professional man, stands on a very different footing from a charge of negligence against a motorist or an employer. The reason is because the consequences for the professional man are far more grave. A finding of negligence affects his standing and reputation. It impairs the confidence which his clients have in him. The burden of proof is correspondingly greater. The principle applies that: "in proportion as the charge is grave, so ought the proof to be clear: See *Hornal v. Neuberger Products Ltd* [1957] 1 QB 247.

In the Vancouver General Hospital Case, the Privy Council applied an even higher standard of proof, saying as follows:

> Now the onus is on the respondent to prove beyond reasonable doubt the negligence of which she complains.

Saya dapati yang "standard of care test" bagi tuntutan kes kecuaian telah pun dipenuhi oleh kedua-dua DF1 dan DF2. Jadi saya tidak dapati apa-apa yang menunjukkan kedua-dua defendan atau mana-mana daripada mereka telah gagal menjalankan tanggungjawab atau cuai dalam menjalankan tanggungjawab seperti yang dituntut oleh plaintif.

Berkenaan dengan kebenaran ("consent") untuk kedua-dua pembedahan itu, saya dapati bahawa plaintif telah memberi kebenaran bagi pembedahan pertama. Fakta yang tidak dinafikan yang kes plaintif ini adalah kes kecemasan membuktikan yang plaintif tiada pilihan apabila ia datang ke DF1 dan DF2 pada 20 Disember 1985. Pembedahan terpaksa dilakukan. Exhibit P2 jelas menunjukkan yang plaintif telah memberi kebenaran untuk pembedahan pertama.

Berkenaan pembedahan kedua, plaintif menyatakan "I cannot recollect whether I consented to the operation or not.". Daripada keterangan, jelas plaintif telah memberi kebenaran dan menyatakan "After 20 December 1985 I don't remember if I ever complained that the operation was done without my consent."

Oleh yang demikian atas imbangan kebarangkalian, kebenaran telah diberi oleh plaintif bagi kedua-dua pembedahan.

Dengan sebab-sebab yang diberi itu saya telah menolak tuntutan plaintif yang kedua DF1 dan DF2 cuai dan tidak bertanggungjawab dan oleh itu menolak tuntutan plaintif dengan kos.

[19] With respect, I have to agree that the trial judge did not substantiate her findings with reasons. An easy way out in this kind of situation is for this court to order a retrial. But in view that the cause of this action arose in 1985 and the fact that the case had been delayed for a considerable time, where 9 witnesses had testified and voluminous documents being tendered as exhibits, it is not in the best interest of all parties concerned, and above all justice, that the case be sent back to the Sessions Court to be heard again by another judge.

[20] In view of the above, I decided to approach this appeal by examining the record whether there are enough materials to support the conclusion of the trial judge that on the balance of probabilities the appellant had failed to prove her case or whether there are sufficient evidence to support the appellant claims that the hospital or/and Dr. Sabapathy were negligence.

[21] I will first deal with the contention of the appellant on the negligence of Dr. Sabapathy:

(i) Failed to insert a corrugated drain to drain the wound in the first operation which by itself had brought about those infections and that he had failed to indicate that a drain if any was inserted.

[22] On this issue it is the appellant's contention that Dr. Sabapathy had failed to insert a corrugated drain in the first operation as it was not noted anywhere in the doctor's notes. To substantiate her contention the appellant relied on the evidence of Dr. Kylasa Somasundram (DW3) who during cross examination gave evidence that:

> From the records it seem second defendant saw the plaintiff once on 21 December 1985 and he gave orders but no order to remove drain. I agree that no note anywhere that he had removed the drain.
>
> On the assumption that a drain was inserted and removed, there is a failure to record, this is not mentioned in the doctor's order and the nursing report.
>
> It is significant to observe that the dressing was dry and the drain had not served its function. If having observed this is significant to note it down.
>
> If the doctor removed it would be noted somewhere either by the doctor or the nurses.
>
> If a drain had not been inserted in the first operation it would have shown a certain level of incompetence.
>
> Recording by surgeons should be done immediately after the operative procedures and the post operative orders for the nurses.
>
> The infection suffered by plaintiff was not in- consistent with the drain not inserted.

[23] In connection to the above evidence the appellant then referred to the evidence of Dr. Muthukumaran (PW2) the consultant surgeon at Tung Shin Hospital who stated:

> If a drain had not been done in the first operation, I do not think the complication that had arisen would have arised.
>
> Inadequate drainage would have caused the infection.

[24] Dr. Sabapathy in his evidence testified that the drain was inserted but removed 24 hours later. In examination in chief he said as follows:

> When I performed the operation I found there was free blood in the peritoneal cavity. The right ovary had a cyst that had ruptured and the appendix was mildly inflamed. I proceed with the operation. I cleared the peritoneal cavity of the free blood. I

excised (removed) the ovarian cyst and then repaired the ovary and removed the appendix. Then clean the peritoneal cavity again. I then put a drain in the wound and closed the incision.

During the operation, I cleaned peritoneal cavity twice. Normally we do it only once. Here because there was blood I could not see anything, so I had to clean the blood before I could reach the ovary to see if that was the source of the bleeding.

I said I put a drain in the wound. In this particular case it was put so that I could see if there was further bleeding in the ovary. There was no such bleeding after the operation. The drain was there for about 24 hours or less. The drain was removed because there was no bleeding.

[25] The trial judge did not accept the appellant's allegation that Dr. Sabapathy had failed to insert a corrugated drain after the first operation. Instead she chosed to belief Dr. Sabapathy. On the evidence available, I am in agreement with the trial judge. Dr. Sabapathy testified the evidence drain was inserted and removed 24 hours later is supported by evidence of DW3. DW3 in his evidence said the following:

Infection of the wound does not necessarily mean improper drainage because the infection is the end result of the interaction of the quantum of bacterial infection against the host resistance against the infection and the support given to host in the form of antibiotic. From my experience, even if a drain is inserted infection can still set in.

[26] In light of the above I am unable to hold that no drain was ever inserted in the first operation as alleged by the appellant.

(ii) Dr. Sabapathy altered the medical records, and tempered with evidence.

[27] The appellant submitted that the fact Dr. Sabapathy altered the medical record and thus tempered with evidence was admitted by Dr. Sabapathy himself. The appellant was referring to the evidence of Dr. Sabapathy during examination in chief where he said:

The words 'in right gutter' were inserted when I transcribed the notes into type written form.

P13, I typed it myself. It is type written transcription of the hospital notes. In P13, under date 20 December 1985. P12, I typed "extended medially" but now I say "extended muscle cutting" is correct.

A At the time I wrote P5 the words "in right gutter" were not there. I added when I prepared P13, the transcription. I did this about two years back.

[28] From the above, it was the contention of the appellant that Dr. Sabapathy altered his notes two years before the trial, to suit his contention that a drain had been inserted in the first operation, even though it had not been done. To the appellant, it was an afterthought on the part of Dr. Sabapathy because he realized two years before the trial that he had been grossly negligent in not inserting a drain in the first operation. As such the appellant contended that P5 and P13 are not reliable documents and Dr. Sabapathy not a credible witness.

[29] However as stated earlier, the trial judge accepted the evidence of Dr. Sabapathy that a drain was inserted during the first operation. Thus, the contention of Dr. Sabapathy altered the record, was rightly rejected by the trial judge. To me, what Dr. Sabapathy did when he type P13, was not altering the medical records or tempered with evidence. He was merely recording what transpired in relation to the operation conducted on the appellant. Dr. Sabapathy testified in effect that the drain was inserted but not recorded. According to him at that time he had failed to complete his notes. Thus, only when he prepared his type written note, he inserted the fact that the drain was inserted which according to him was a fact. I have no reasons to disagree.

[30] Again, on the evidence and facts presented at the trial I am unable to conclude that Dr. Sabapathy had altered the medical records and tempered with the evidence.

(iii) Failed to ensure immediate administration of antibiotic after the operation.

[31] It is the appellant's contention that there had been undue delay in administering antibiotics after the first operation. According to the appellant that the first administration of antibiotic should be given within the hour of the operation, if not before or during operation. Here, according to the applicant, the first antibiotics was given about nine hours after operation, which contributed to the infection, which resulted in the second operation.

[32] It is also the appellant's contention that Dr. Sabapathy had failed to insert the word 'stet' for immediate administration of medication in the relevant hospital record and caused further confusion as the administration of that vital dose antibiotics. It is submitted that had the first respondent put the word 'stet', the particular medicine would have been administered immediately.

[33] It is further contended by the appellant that Dr. Sabapathy failed to recognize the appellant was deteriorating in health from 22 December 1985 onwards and that immediate alternative steps ought to have been taken. To the appellant, Dr. Sabapathy had failed to supervise the support system of the hospital in ensuring his medical directions were carried out. He failed to leave adequate or any instructions before he went on leave from 28 December 1985 to 6 January 1986. According to the appellant, Dr. Sabapathy failed to seek alternative doctor to manage the appellant so that timely operation intervention could had taken place earlier.

[34] Dr. Sabapathy testified that the antibiotic were administered without delay. In his evidence he said to the effect that:

(i) that the practice of giving antibiotics in 1985/1986 at the hospital, was that as soon as the operation was over, the surgeon write the posts operative treatment which included antibiotic;

(ii) that the first dose was given in the recovering room attached to the operation theatre;

(iii) that there was no practice to give antibiotic injection such a case just before or during the operation unless the case involved a brain, heart or bone replacement surgery; and

(iv) that as far as post operative antibiotics were concerned, the nurses were aware for the practice. According to Dr. Sabapathy the word 'stet' did not have to be inserted in the surgeon's instruction to the nurses because it is routine to give the antibiotics immediately without delay.

[35] In his evidence Dr. Sabapathy specifically said that after the first operation he ordered Penbritin and Netyromycin to be administered on the appellant. Later he changed antibiotics to cefoid because of the rise in plaintiff's temperature. However he denied that the appellant was having spiking temperature as suggested by PW2. On this issue he said as follows:

A I do not agree with PW2 that there was spiking temperature from the first operation up to the second operation. "Spiking temperature" means when the temperature goes repeatedly above 38 C (100 F). This was not in this case. Before I went on leave drugs were given for the rise in temperature.

B **[36]** Thus from the evidence available, I am unable to accept the appellant's contention that Dr. Sabapathy had failed to ensure immediate administration of antibiotic after the operation. As can be seen later in addressing the appellant's contention against the hospital that antibiotic were in fact administered on the appellant.

C **[37]** Now, I will deal with respect of the appellant's contention on the negligence of hospital. The complaints of the appellant may be summarized under two headings:

D (i) Failure to properly administer adequate and correct antibiotics to prevent post-operative infections.

(ii) Failure to appreciate that conservative treatment of the appellant was not working and that the second operation was needed much earlier than it was performed.

E

(i) Failure to properly adequate and correct antibiotic to prevent post-operative infections.

[38] It is the contention of the appellant that there was a total F failure to ensure adequate and correct antibiotics were administered to her to prevent post operative infections. According to the appellant, the operation was a simple operation for appendicitis. A ruptured ovarian cyst was found, and both appendix and ovarian cyst were removed by the hospital. The G appellant contended that she should be at the hospital for only about 2-3 days but due to the negligent management of the operation and post operative treatment and care, she landed there for almost a month. To the appellant, the extended stay at the hospital was due to the total failure on the part of the hospital to H ensure adequate and correct antibiotics were administered to the appellant after the first operation to prevent post operative infections. According to the appellant the negligent management of the operation and post operative treatment of the appellant made it necessary for the appellant to be admitted at the first I respondent for about a month. To the appellant, the failure to ensure adequate and correct antibiotics were administered to her after the first operation was a contributing factor that resulted in the infections and the second operation.

[39] According to the appellant, if flagyl had been administered from the beginning or after the first operation, infection of the wound could have been avoided. According to the appellant that it is evident that despite doctor's instruction to administer flagyl immediately on 25 December 1985, it was only administered to the appellant on 29 December 1985, and that too an inadequate dosage, ie, 1/5 of the prescribed dosage. To the appellant, this is gross negligence in the part of the hospital.

[40] In reply, the hospital in gist stated as follows:

(i) It was the duty of Dr. Sabapathy to prescribe the antibiotic to which was done. It was not the duty of the hospital to ensure the antibiotics prescribed were the right ones;

(ii) The original antibiotics prescribed were the right one, being merely prophylactic antibiotic – Penbritin and Netromycin;

(iii) Choice of drugs is dependant on clinical judgement of the doctor;

(iv) There is a body of opinion which supports the view that there is no necessity to give antibiotics for the kind of operation undergone by the appellant;

(v) Antibiotic would not have been necessary in the first place to treat the appellant post-operation. The wrong antibiotic or lack of the same could not have caused the infection which led to the second operation. In fact, intra abdominal infection can still occur despite proper antibiotics cover.

(vi) Penbritin and Netromycin and other medication including Flagyl were dispensed to the appellant in accordance with P14. This was corroborated by the Graph Chart P9A, P9B, P9C, and P17. The Color Chart is most reliable. Doctors do not rely on medical sheet; and

(vii) New bottles of Flagyl will only be issued by the pharmacy upon return of empty bottles. Then has been no situation where medication was not given.

[41] On this issue whether adequate and correct antibiotic were administer on the appellant, it is relevant to refer what was decided by the trial judge. This is what she stated:

> Daripada keterangan saksi dan dokumen yang dikemukakan khususnya kad-kad seperti 'cardex card' bagi ubatan yang diberi (Exhibit D31); dan suntikan ("injections") yang diberi (Exhibit D35); dan "observation chart" (Exhibit P9Ac) jelas bahawa rawatan telah diberi oleh pihak DF1. Dari rekod yang diperolehi daripada kad-kad ini jelas jagaan yang dijangka telah pun diberi oleh DF1. Exhibit P14 ("Doctor's Order Sheet") dan Exhibit P8C ("Medicine Sheet") menunjukkan ubatan telah diberikan oleh DF1 seperti diarah DF2, doktor yang bertanggungjawab menjaga plaintif.

[42] Clearly, the trial judge correctly and adequately took into account all relevant evidence and exhibits in arriving at her finding of facts in favor of the respondent on this issue. Unfortunately, she did it without giving her reasons. But as stated earlier on the evidence and facts available in this case, the hospital could not be said to be negligent for failure to properly administered adequate and correct antibiotics to prevent post operative infections.

[43] With regard to the non-administration of antibiotic to the appellant, before or after the operation, there is evidence to support the view that there is no necessity to give antibiotics for the kind of operation undergone by the appellant. PW2 during cross-examination agreed to two passages in the *British Medical Journal Vol. 280 January-March 1980 (Medical Literature p. 29)* which provides as follows:

> (i) use of prophylactic antibiotics in all cases of acute appendicitis is a questionable value; and
>
> (ii) if a normal or inflamed appendix is encountered, then appendicectomy should not be followed by any antibiotic treatment.

Further another expert, DW3 in cross-examination stated that it is debatable whether prophylactic antibiotics are needed for removal of a normal and mildly inflamed appendix. For a straight forward ruptured ovarian cyst, DW3 agrees that it is again debatable whether prophylactic are needed. DW3 agrees that there is a body of opinion which says it is not necessary.

[44] In light of the above evidence, the hospital could not be said to the negligence because of insufficient antibiotic was administered to the appellant. In any event as found by the trial judge that sufficient antibiotic and/or other required medicine was administered to the appellant. From the record there are evidence to support the said findings. P14, the doctor's order sheet clearly

indicated that sufficient antibiotics, namely Netromycin, and Penbritin, and other medication including flagyl were dispensed to the appellant. This was further indicated in the color band in the graph charts marked as P9A, P9B and P9C for the antibiotics in particular netromycin, penbritin and cefoid and in the table and output chart marked as P17 for flagyl.

[45] P9A, P9B, P9C and P17 were documents tendered by virtue of the system of dispensation in the hospital and evidence was adduced as to the manner the documents were created and recorded. The night supervisor of the hospital, Theresa Paugajshi (DW4) in examination in chief gave evidence as to the procedure adopted in the hospital in respect of administration of medication to their patients. According to him the medication nurse would write the particulars of the patient and the medication on a pink cardex similar as D31 which is used as a reference for the nurses when medication is given. The medication nurse would also write on a white injection card similar to the one marked as D35, the room or bed number of the patient, the date, the name of patient, name of drug and the times to serve the drug. The white injection card is slotted into pigeon holes with the time for administration of the same written on the pigeon holes. When it is due for administration, the drug is put for the intended specific time slot in the compartments. Once the drug has been dispensed to the patient, the white injection card D35 is moved to the next time slot so that the same procedure will then be repeated. According to DW4, that is the system at the hospital.

[46] In cross examination by the appellant's counsel, and in re-examination DW4 gave evidence that the staff nurse on night shift will color a band on the graph chart marked P9A, P9B and P9C for the day to indicate that the particular medication has been dispensed to the patient. This is based on the white injection card having been moved to the last slot in the pigeon hole for the last shift and the existence of the correct quantity of empty bottles.

[47] The trial judge accepted the evidence of DW4 on this issue and decided in favor of the hospital. He accepted DW4 evidence that the color chart is the most reliable to indicate that drug has been dispensed. I have no reason disagree.

[48] The appellant has attempted to show that there was insufficient flagyl administered on the appellant by virtue of the fact that in the Medical Sheet (P8) flagyl was recorded as '100 mg'

and that certain entries in the Medicine Sheet were not initialed for other medication like netromycin, penbritin and ceforid. But as submitted by the hospital that failure to complete notes does not indicate negligence. More importantly is that there is ample evidence supporting the hospital's contention that the medicine prescribed had been dispensed. There is the evidence of DW4, which is not challenged that flagyl only comes in 100 ml bottles. Therefore, it is not possible for only 100 gm of flagyl, as recorded in the Medical Sheet (P8) to be given as opposed to 100 ml. I am also of the view that the non initial of the Medicine Sheet by the nurses for the antibiotics, netromycin, penbritin and cefoid, does not in any way indicate that those antibiotic have not been dispensed to the appellant. If anything, it indicates a recording carelessness of the nurses. Surely it is not negligence. To me the colour chart supported the evidence that the medicine was dispensed at all times to the appellant. Hence, the applicant contention that the hospital failed to properly administer adequate and correct antibiotic must fail.

(ii) Failure to appreciate that conservative treatment of the appellant was not working and that the second operation was needed much earlier that it was performed.

[49] The appellant contended that after the first operation Dr. Sabapaty went on leave from 28 December 1985 to 6 January 1986. The second operation was conducted on 7 January 1986 ie, 17 days between the first and second operation. According to the appellant, although there were suggestions for an early laparatomy, there were no actions taken by attending doctor, Dr. K.T. Lim, at that time. No explanation was given to the appellant by the hospital. The appellant was made to wait until the second respondent returned from his leave to perform the second operation. The delay in preparing the laparatomy, according to the appellant was not justified. To the appellant the delay in the second operation was a contributory factor for her internal injuries, pain and suffering.

[50] The hospital in reply contended that whether an early laparatomy had been done was a clinical judgement and in this case Dr. K.T. Lim who relieved Dr. Sabapathy when Dr. Sabapathy was away between the period of 28 December 1985 to 5 January 1986 adopted conservative treatment. Thus, according to the hospital, as conservative treatment was adopted, there was no necessity to carry out a laparatomy then.

[51] In this respect it is pertinent to examine at what was said by Dr. Sabapathy in his evidence. He said that when he returned to work he continued that conservative treatment adopted by Dr. K.T. Lim. However on 7 January 1986, he decided to operate as an infection had localized. He said:

> I terminated conservative treatment because after the evening of the 6 January 1986 she started vomiting again and there was persistent tenderness on the right iliac fossa. This indicate there is a possibility of some pathology (infection) in this area. There is a great possibility that conservative treatment might have helped but would have taken longer period. I decided to operate because of the infection had already localized.

[52] I am in agreement with the hospital on this issue. In this case the appellant was not left unattended. Conservative treatment was adopted by Dr. K.T. Lim. Surely, sufficient time had to be given in order to determine whether conservative treatment was working on the appellant. With regard to the suggestion that early laparatomy should have been performed on the appellant, Dr. Sabapathy said:

> If laparatomy had been taken instead of conservative treatment, it would have resulted in more complication.

Thus, to me whether early laparatomy must be carried out instead of adopting conservative treatment was a clinical decision. Different opinion always exist. If one treatment overtakes the other and goes wrong, it cannot be a basis for a conclusion of negligence.

[53] Thus, if there was a delay, the delay was due to the conservative treatment under taken by Dr. K.T. Lim. DW3 opined that a second operation should be carried out if there is evidence of complete intestinal obstruction but in this case, he noted from the documents submitted to him shows that there was no indication of complete intestinal obstruction. Further DW3 in his examination in chief stated that there was evidence of spepticaemia on 28 December 1985 in the plaintiff. According to him, with spepticaemia it is dangerous to perform a laparatomy on the plaintiff. The expert witness for the appellant, PW2 concurred with the view. PW2 stated that:

(i) it would be dangerous to perform a laparatomy if there was spepticaemia and one of the diagnosis for spepticaemia is by x-ray; and

(ii) it is not necessary to do a laparatomy to find the cause of spepticaemia.

[54] As stated earlier, the decision whether to operate or not is a matter of clinical judgement of the attending doctor. It is for the attending doctor to decide based on the circumstances of the case at that time. To me, the conservative treatment undertook by Dr. K.T. Lim was an acceptable and reasonable practice in such circumstances.

[55] The appellant's expert, PW2 may have a different view on this matter. But the different of opinion as to the treatment of a patient, does not make a doctor negligent merely because his opinion leading to his diagnosis differs from that of other doctors. What is important is he acts with the ordinary care and skill of a doctor with his qualification. In *Hucks v. Cole and Author* [1968] 112 SJ 483, Lord Denning MR stated the following:

> A doctor was not to be held negligent simply because something went wrong. He was not liable for mischance or misadventure, nor for error of judgement. He was only liable if he fell below the standards of a reasonable competent practitioner in his field, so much so that his conduct was deserving of censure or inexcusable.

[56] What Dr. K.T. Lim had decided then was his clinical judgement. In fact it would be wrong on his part to proceed with laparatomy operation without attempting a conservative treatment. In *Schanczl v. Singh* [1988] 2 WWR 465 (Alta QB) a Canadian case, the defendant surgeon was held negligent for fairly to attempt a conservative treatment before resorting to spinal surgery. In Schanczl, the patient was referred to the defendant due to persistent pain in his lower back and his left leg. Instead of recommending conservative management such as bedrest, muscles relaxants, heart and traction, the defendant proceeded with myelogran and spinal surgery, Marshall J state the following:

> For a specialist to plunge ahead and operate in the circumstances was exercising entirely undue haste ... A surgeon is retained to perform surgery, but also to avoid performing surgery in the appropriate circumstances.

[57] Thus, I am of the view, the allegation made by the appellant in respect of the conservative treatment, timing of the second operation and the early laparatomy all involved clinical judgment. The hospital cannot be faulted where such judgements were exercised.

[58] It is for the above-reasons, I am also of the view that the maxim of res ipsa loquitor or 'the things speaks for itself' is not applicable in this case. It is the appellant's contention that the maxim of *res ipsa loquitor* applies in this case as on the facts there are evidence of the 'thing' namely:

(i) Dr. Sabapathy failed to insert a corrugated drain in the first operation;

(ii) Delay in administering antibiotics after the first operation;

(iii) Omission to insert the word 'stet' for the immediate administration of medication;

(iv) Failure to ensure adequate and correct antibiotics were administered;

(v) Undue delay in the performance of the second operation;

(vi) Failed to appreciate the ineffectiveness of conservative treatment;

(vii) Failure by both respondents to recognize that the appellant was deteriorating in health and immediate alternative steps ought to have been taken;

(viii) Failure of Dr. Sabapathy to supervise the support system of the hospital, in ensuring his medical directions were carried out. He even failed to leave adequate or any instructions before he went on leave.

[59] To support the arguments, the appellant relies on the following cases to say that the maxim applies to medical negligence cases:

(i) *Cassidy v. Ministry of Health* [1951] 1 All ER at p 577 ([Tab 2, Jilid 2, appellant's BOA]

> I have gone straight to the result because, in my opinion, on the basis that the hospital was responsible for all those in whose charge the plaintiff was, the surgeon, doctor and nurses, the result seems to me to raise a case of *res ipsa loquitor*.

(ii) *Mahon v. Osborne* [1939] 2 KB 14 at p 22 where the court referred to *Ballard v. North British Railway Co* [1923] SC (HL) 53. Lord Dunedin said:

> Whether the expression *res ipsa loquitor* is applicable or not depends upon whether in the circumstances of the particular case, the mere fact of the occurrence which cause hurt or damage is a piece of evidence relevant to infer negligence ... Where complete control rests with the defendant and it is the general experience of mankind that the accident in question does not happen without negligence, the maxim may well apply.

[60] I am of the view that the maxim of *res ipsa loquitor* does not apply in this case. To me, the fact that the patient came out of a hospital in a worse condition before admittance does not constitute proof of negligence by the hospital staff. One must be able to accept that medical treatment carries the risk and the occurrence of injury is not necessarily evidence of lack of reasonable care.

[61] For the above-reasons, the appellant's appeal was dismissed with costs.